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360HEROS, INC.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GOPRO, INC., a Delaware corporation,

Plaintiff and
Counterdefendant,

vs.

360HEROS, INC., a Delaware corporation,

Defendant and
Counterclaimant.

Case No.: 16-cv-01944-SI

Honorable Susan Illston

**DECLARATION OF EDWARD C.
SCHEWE**

Date: March 23, 2018

Time: 9:00 AM

Ctrm: 1, 17th Floor

1 I, Edward C. Schewe declare and state:

2 1. I am an attorney with Gauntlett & Associates (“G&A”) and I am lead defense counsel
3 for Defendant 360Heros, Inc. in this case.

4 2. I know the facts set forth in this declaration to be true and correct based on my
5 personal knowledge thereof and, if called to testify, I could and would testify competently thereto.

6 3. I submit this Declaration in Support of 360Heros’ Motion in Limine to Exclude the
7 Expert Testimony of Derek M. Duarte, 360Heros’ Opposition to GoPro’s Motion for Partial
8 Terminating Sanctions, and 360Heros’ Opposition to GoPro’s Motion for Summary Judgment.

9 4. Attached as **Exhibit 476** is a true and correct copy of the file history for the 360Abyss
10 trademark application, Serial No. 86-463,727, Bates-stamped 360H-01408 - 360H-01487.

11 5. Attached as **Exhibit 477** is a true and correct copy of the file history for the 360Abyss
12 registered trademark, Registration No. 5,0149,563, Bates-stamped 360H-01488 – 360H-01515.

13 6. Attached as **Exhibit 478** is a true and correct copy of a November 2014 article titled
14 “360Abyss Allows Underwater VR Filming at Depths of 1,000 Metres – VR Focus”, Bates-stamped
15 360H-17870 – 360H-17871.

16 7. Attached as **Exhibit 479** is a true and correct copy of a test email from 360Heros
17 Newsletter to Michael Kintner on November 21, 2014 titled “Introducing the 360Abyss: 7.5K
18 Underwater 360 Video at a Depth of 1000 Meters!”, Bates-stamped 360H-20496 – 360H-20500.

19 8. Attached as **Exhibit 480** is a true and correct copy of an email from Michael Kintner
20 to John Deneen on November 23, 2014 titled “360Heros 360Abyss – HD 7.5k 360 Video to 1,000
21 meters,” Bates-stamped 360H-20496 – 360H-20500.

22 9. Attached as **Exhibit 481** is a true and correct copy of an email between William
23 Macdonald to Michael Kintner on November 14, 2014 titled “Re: 360Heros 360Abyss Features and
24 Specifications”, Bates-stamped 360H-20593 – 360H-20594.

25 10. Attached as **Exhibit 482** is a true and correct copy of an email between William
26 Macdonald to Michael Kintner on November 14, 2014 titled “Re: 360Heros 360Abyss Features and
27 Specifications”, Bates-stamped 360H-20593 – 360H-20594

28 11. Attached as **Exhibit 483** is a true and correct copy of an email chain between Michael

1 Kintner and Danfung Dennis from October 19, 2014 through November 19, 2014 titled “Re:
2 Underwater scuba kit,” Bates-stamped 360H-20575 – 360H-20577.

3 12. Attached as **Exhibit 484** is a true and correct copy of an email from Michael Kintner
4 to John Deneen and others on November 23, 2014 titled “360Heros 360Abyss – HD 7.5K 360 Video
5 to 1,000 meters”, Bates-stamped 360H-20570 – 360H-20571.

6 13. Attached as **Exhibit 485** is a true and correct copy of a table that lists the Abyss sales
7 per month in Euros in the United States from December 2014 to March 2017, Bates-stamped GP
8 (360) 14035.

9 14. Attached as **Exhibit 486** is a true and correct copy of a table that lists the customer
10 information and specific date for each Abyss sale listed in Exhibit 485, Bates-stamped GP (360)
11 00016328 – GP (360) 00016329.

12 15. Attached as **Exhibit 487** is a true and correct copy of a table that lists the Abyss sales
13 per month in Euros in the United States from December 2014 to March 2017, Bates stamped GP
14 (360) 00013024.

15 16. Attached as **Exhibit 488** is a true and correct copy of a Discovery Letter submitted to
16 the Court on November 7, 2017, ECF No. 128.

17 17. Attached as **Exhibit 489** is a true and correct copy of a table that lists the customer
18 information and specific date for each Abyss sale listed in Exhibit 485, Bates-stamped GP (360)
19 00020931.

20 18. Attached as **Exhibit 490** is a true and correct copy of a table that lists the customer
21 information and specific date for each Abyss sale listed in Exhibit 485, Bates-stamped GP (360)
22 00020930.

23 19. Attached as **Exhibit 491** is a true and correct copy of a table that lists the customer
24 information and specific date for each Abyss sale listed in Exhibit 485, Bates-stamped GP (360)
25 00020929.

26 20. Attached as **Exhibit 492** is a true and correct copy of an email from Danfung to
27 Michael Kintner on November 28, 2014 titled “Re: 360 Abyss order”, Bates-stamped 360H-20595 –
28 360H-20596.

1 21. Attached as **Exhibit 493** is a true and correct copy of a 360Heros letter to GoPro on
2 January 8, 2018.

3 22. Attached as **Exhibit 494** is a true and correct copy of a 360Heros letter to GoPro on
4 January 11, 2018.

5 23. Attached as **Exhibit 495** is a true and correct copy of a 360Heros letter to GoPro on
6 January 19, 2018.

7 24. Attached as **Exhibit 496** is a true and correct copy of GoPro's letter to 360Heros on
8 December 1, 2017 demanding NMS Capital communications and documents.

9 25. Attached as **Exhibit 497** is a true and correct copy of Michael Kintner's email to
10 Vijay Chandran and other NMS Capital members on September 28, 2016 titled "RE: Moving
11 Forward" wherein Michael Kintner states he will upload documents to NMS Capital for their review,
12 Bates-stamped 360H-22671 – 360H-22676.

13 26. Attached as **Exhibit 498** is a true and correct copy of the Timeline that Michael
14 Kintner prepared and uploaded to NMS Capital. It was produced separately as Bates-stamped 360H-
15 22830 – 360H-22831 and as part of a zip folder with all documents uploaded to NMS Capital as
16 Bates-stamped 360H-23023 on January 19, 2018.

17 27. Attached as **Exhibit 502** is a true and correct copy of an excerpt from the USPTO file
18 history of patent Registration No. 9,152,019 wherein the date listed for Joergen Geerds' 360 rig
19 presentation listed under the Non-Patent Publications category was crossed out and a March 3, 2013
20 date typed above, Bates-stamped 360H-00119 – 360H-00120.

21 28. Attached as **Exhibit 505** is a true and correct copy of 360Heros' First Set of Requests
22 for Production served to GoPro on October 27, 2016.

23 29. Attached as **Exhibit 506** is a true and correct copy of GoPro's Supplemental
24 Responses to 360Heros' First Set of Interrogatories [Nos. 1-10] served to 360Heros on November 3,
25 2017.

26 30. Attached as **Exhibit 507** is a true and correct copy of Plaintiff's Second Amended
27 Initial Disclosures served to 360Heros on November 2, 2017.

28 31. Attached as **Exhibit 508** is a true and correct copy of excerpted pages 131-133, 211-

1 212 of the Deposition of Alexandre Jenny held on October 3, 2017.

2 32. Attached as **Exhibit 510** is a true and correct copy of excerpted pages 2-7, 69, 86-88,
3 90-91, 131-135, 191-194 of the Deposition of Alexandre Jenny held on October 3, 2017.

4 33. Attached as **Exhibit 511** is a true and correct copy of Defendant 360Heros, Inc.'s
5 Responses to Plaintiff's First Set of Request for Production of Documents, Nos. 1-94, served to
6 GoPro on November 21, 2016.

7 34. Attached as **Exhibit 512** is a true and correct copy of an email from counsel for
8 GoPro to 360Heros on September 27, 2017, titled "GoPro, Inc. v. 360Heros, Inc. – GoPro document
9 production."

10 35. Attached as **Exhibit 513** is a true and correct copy of an email from Michael Kintner
11 to Carl Vahl dated January 15, 2016 containing Skype conversation transcript between Michael
12 Kintner and Alexandre Jenny, Bates-stamped 360H-02458 – 360H-02459 ("Forwarded Email").

13 36. Attached as **Exhibit 514** is a true and correct copy of GoPro's version of a Skype
14 conversation transcript between Michael Kintner and Alexandre Jenny from November 8, 2012 to
15 March 20, 2014.

16 37. Attached as **Exhibit 515** is a true and correct copy of three invoices from 360Heros,
17 rebranded as 360Rize, to purchasers of the 360Abyss rig, Bates-Stamped 360H-12962, 360H-12975,
18 360H-13072.

19 38. Attached as **Exhibit 516** is a true and correct copy of excerpted pages 17, 23-24, 36,
20 42-43, 46, 52, 60-61, 86-88, 90-92, 93-94 of the rough draft transcript for the Deposition Testimony
21 of Derek M. Duarte held on March 6, 2018.

22 39. Attached as **Exhibit 523** is a true and correct copy of an email sent by Michael
23 Kintner to himself on July 20, 2015 containing a Skype conversation transcript between Michael
24 Kintner and Alexandre Jenny with the attorney-client communication redacted, Bates-stamped
25 360H-17246 – 360H-17247 ("Redacted Email").

26 40. Attached as **Exhibit 524** is a true and correct copy of an email sent by Michael
27 Kintner to himself on July 20, 2015 containing a Skype conversation transcript between Michael
28 Kintner and Alexandre Jenny, Bates-stamped 360H-17457 – 360H-17458 ("Original Email").

1 41. Attached as **Exhibit 529** is a true and correct copy of a Blog post on the Kolor
2 website, dated July 31, 2014, Bates-stamped GP (360) 00014017 – GP (360) 00014018.

3 42. Attached as **Exhibit 530** is a true and correct copy of three invoices from 360Heros,
4 rebranded as 360Rize, for the sale of a 360Abyss rig, Bates-stamped 360H-12962, 360H-12975,
5 360H-13072.

6 43. Attached as **Exhibit 531** is a true and correct copy of a Twitter announcement from
7 Kolor made on July 31 2014, Bates-stamped GP (360) 00012139.

8 44. Attached as **Exhibit 532** is the share purchase agreement between Kolor and GoPro,
9 Bates-stamped GP (360) 00016050 - GP (360) 00016096.

10 45. Attached as **Exhibit 534** a true and correct copy of screenshots of an email from
11 Michael Kintner to himself on July 20, 2015 containing a Skype conversation between Michael
12 Kintner and Alexandre Jenny.

13 46. Attached as **Exhibit 558** is a true and correct copy of the Trademark Application
14 History for the 360Heros mark, Bates-stamped 360H-02225 – 360H-02281.

15 47. Attached as **Exhibit 559** is a true and correct copy of two images displaying the
16 360RV label with a disclaimer underneath, and various screenshots of Internet Archive captures of
17 the 360Heros website, Bates-stamped 360H-17060 – 360H-17137.

18 48. Attached as **Exhibit 560** is a true and correct copy of an email from Eve Saltman and
19 Michael Kintner dated July 2, 2014 titled “Email from GoPro,” Bates-stamped GP (360) 00002773 -
20 GP (360) 00002774.

21 49. Attached as **Exhibit 561** is a true and correct copy an email chain between Michael
22 Kintner Exhibit and Eve Saltman from July 2, 2014 through July 15, 2014 titled “Re: Email from
23 GoPro,” which had been previously marked as Exhibit 422, and is Bates-stamped GP (360)
24 00002772 - GP (360) 00002774.

25 50. Attached as **Exhibit 562** is a true and correct copy an email chain between Charlie
26 Schmitt of 360Heros and Eve Saltman from August 7, 2014, titled “Re: 360Heros,” Bates-stamped
27 GP (360) 00015980 - GP (360) 00015981.

28 51. Attached as **Exhibit 563** is a true and correct copy of an email from Eve Saltman to

1 Charlie Schmitt of 360Heros dated January 28, 2015 titled "Checking in," Bates-stamped 360H-
2 20528.

3 52. Attached as **Exhibit 564** is a true and correct copy an email chain between Eve
4 Saltman and Charlie Schmitt of GoPro from January 30, 2015 through February 2, 2015 titled "RE:
5 Checking in," Bates-stamped 360H-20539.

6 53. Attached as **Exhibit 565** is a true and correct copy of Applicant Michael Kintner's
7 Answer to GoPro's Notice of Opposition submitted to the USPTO, ESTTA728677, filed on
8 February 22, 2016, Bates-stamped 360H-01644 – 360H-01651.

9 54. Attached as **Exhibit 566** is a true and correct copy of a correspondence from Kirkland
10 & Ellis on behalf of 360Heros to Ryan Bricker dated March 17, 2016, titled "Re: Your
11 communications with 360Heros," Bates-stamped GP (360) 00002770 – GP (360) 00002771.

12 55. Attached as **Exhibit 567** is a true and correct copy Plaintiff GoPro's Supplemental
13 Responses to Defendant 360Heros' First Set of Interrogatories [Nos. 1-11] served to 360Heros on
14 April 4, 2017, which had been previously marked as Exhibit 312.

15 56. Attached as **Exhibit 568** is a true and correct copy of excerpted pages 4, 19, 93-106
16 from the Deposition of Gary Bettan held on October 20, 2017.

17 57. Attached as **Exhibit 569** is a true and correct copy of an email from Gary Bettan to
18 Kal Weiss on June 19, 2015 titled "360Heros" which had been used as Exhibit 400 in the Deposition
19 of Gary Bettan held on October 20, 2017, Bates-stamped BD_000011.

20 58. Attached as **Exhibit 570** is a true and correct copy of excerpted transcript pages 9, 16,
21 17, 129, 130, 143, 144 - 11-20-17 from Deposition of Marco Vidali held on November 20, 2017.

22 59. Attached as **Exhibit 571** is a true and correct copy of excerpted transcript pages 5,
23 103, 104, 123-125, 09-15-17 from the Deposition Joergen Geerds held on September 15, 2017.

24 60. Attached as **Exhibit 572** is a true and correct copy of excerpted transcript pages 7,
25 86-88, 90-91 from the Deposition of Alexandre Jenny held on October 3, 2017.

26 61. Attached as **Exhibit 573** is a true and correct copy of excerpted transcript pages 6,
27 41-45 from the Deposition of Ingrid Cotoros held on October 13, 2017.

28 62. Attached as **Exhibit 574** is a true and correct copy of excerpted transcript pages 1, 9,

1 97-101, 115-117, 197-198 from the Deposition of Justin Wilkenfeld held on October 24, 2017.

2 63. Attached as **Exhibit 575** is a true and correct copy of excerpts of the transcript of the
3 Deposition of Michael Kintner held on July 25, 2017.

4 64. Attached as **Exhibit 576** is a true and correct copy of Legal Zoom Trademark Search
5 Results for 360Heros, Bates-stamped 360H-15152 – 360H-15170.

6 65. Attached as **Exhibit 577** is a true and correct image of 360Heros' 360Abyss rig,
7 Bates-stamped 360H-P014.

8 66. Attached as **Exhibit 578** is a true and correct copy of GoPro's Notes to Consolidated
9 Financial Statements, Bates-stamped GP (360) 00017688.

10 67. Attached as **Exhibit 579** is a true and correct copy of the TTAB Petition for
11 Cancellation and related documents for the GoPro Be a Hero Mark.

12 68. Attached as **Exhibit 580** is a true and correct copy of 360Heros' U.S. Registration
13 Certificate for the 360Abyss mark.

14 69. Attached as **Exhibit 581** is a true and correct copy of a summary of a meeting
15 between 360Heros and Nick Woodman of GoPro, Bates-stamped 360H-02545, 360H-2547.

16 70. Attached as **Exhibit 582** is a true and correct copy of a Blog post from
17 www.360Rize.com dated April 30, 2013 discussing the BECK project, Bates-stamped GP (360)
18 00015845 - GP (360) 00015851.

19 71. Attached as **Exhibit 583** is a true and correct copy a screenshots of the
20 www.360rize.com including 360Rize Company News and sales information for various rigs.

21 72. Attached as **Exhibit 584** is a true and correct copy of an article titled "State & Union:
22 Olean's 360Rize collaborates on 'Battle Road' from www.oleantimesherald.com dated November 2,
23 2016, Bates-stamped 360H-18055 – 360H-18058.

24 73. Attached as **Exhibit 585** is a true and correct copy of excerpted transcript pages 66-
25 67, 89, 102-105 from the Deposition of Michael Kintner held on January 31, 2018.

26 74. Attached as **Exhibit 586** is a true and correct copy of an email chain between
27 360Heros and its distributor Manfrotto dated June 8, 2017, attaching 360Rize marketing
28 information, previously marked as Exhibit 9 to the January 31, 2018 Deposition of Michael Kintner,

1 and Bates-stamped 360H-18528, 360H-18530 – 360H-18574.

2 Executed under penalty of perjury at Irvine, California on this 9th day of March 2018.

3
4 /s/ Edward C. Schewe

5 Edward C. Schewe
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